

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

AMERICANS FOR PROSPERITY
1310 North Courthouse Road, Suite 700
Arlington, VA 22201,

Plaintiff,

v.

EXPORT-IMPORT BANK OF THE UNITED STATES
811 Vermont Avenue, N.W.
Washington, D.C. 20571;

and

U.S. DEPARTMENT OF THE TREASURY
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220,

Defendants.

Civil Action No. 19-2948

COMPLAINT

1. Plaintiff Americans for Prosperity (“AFP”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking access to records maintained by Defendant Export-Import Bank of the United States (“Ex-Im”) and Defendant U.S. Department of the Treasury (“Treasury”), by and through their various components and offices.

2. The two FOIA requests at issue in this case—neither of which has received a timely determination—seek records concerning Ex-Im’s efforts, in cooperation with Treasury, to conduct outreach with foreign export entities and international organizations to reduce the use of government subsidized export financing. To date, the requested records remain undisclosed.

JURISDICTION AND VENUE

3. Jurisdiction is asserted pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

4. Venue is proper pursuant to 28 U.S.C. § 1391(e) and 5 U.S.C. § 552(a)(4)(B).

PARTIES

5. Plaintiff AFP is a 501(c)(4) nonpartisan organization that drives long-term solutions to the country's biggest problems. AFP and its activists engage friends and neighbors on key issues and encourage them to take an active role in building a culture of mutual benefit where people succeed by helping one another. In support of its mission, AFP makes use of the FOIA to gather information about the operations of the government. AFP then uses that information to educate the public about the importance of transparency and reform.

6. Defendant Ex-Im is an agency within the meaning of 5 U.S.C. § 552(f)(1). Ex-Im, by and through its various components, has possession, custody, or control of records to which AFP seeks access and that are the subject of this Complaint.

7. Defendant Treasury is an agency within the meaning of 5 U.S.C. § 552(f)(1). Treasury, by and through its various components, has possession, custody, or control of records to which AFP seeks access and that are the subject of this Complaint.

FACTS

I. Ex-Im's Obligation to Reduce the Use of Government Subsidized Export Financing

8. As set forth in its congressional charter, Ex-Im is statutorily required to conduct outreach with foreign export entities and international organizations to reduce the use of government subsidized export financing. *See* 12 U.S.C. § 635(b)(1)(A) (“[Ex-Im] shall, in cooperation with the export financing instrumentalities of other governments, seek to minimize competition in government-supported export financing and shall, in cooperation with other appropriate United States government agencies, seek to reach international agreements to reduce government subsidized export financing.”).

9. Treasury works with Ex-Im to meet this statutory obligation to reduce the use of government subsidized export financing. *See, e.g., U.S. Export-Import Bank – Issues Raised by Recent Market Developments and Foreign Competition: Hearing Before the Subcomm. on Int’l Econ. Policy & Trade of the H. Comm. on Int’l Relations*, 105th Cong. (1998) (statement of JayEtta Z. Hecker, Assoc. Dir., Nat’l Sec. & Int’l Affairs Div., U.S. Gen. Accounting Office), *available at* <http://bit.ly/2yK6o6f> (“[Ex-Im], under the leadership of [Treasury], participates in ongoing [Organisation for Economic Co-operation and Development] negotiations to minimize export financing competition and reduce government export credit subsidies.”).

II. Defendants’ Processing of AFP’s FOIA Requests

A. Export-Import Bank of the United States (FOIA Request No. 201900059F)

10. By letter, dated July 24, 2019, AFP submitted a FOIA request to Ex-Im seeking access to three categories of records:

1. All internal communications regarding EXIM’s actions to “reduce government subsidized export financing.”
2. All external communications, including but not limited to the following entities, regarding EXIM’s actions to “reduce government subsidized export financing.”
 - a. The White House
 - b. Department of the Treasury
 - c. Export financing instrumentalities of other governments
 - d. International organizations
3. All records (memoranda, policy documents) regarding EXIM’s actions to “reduce government subsidized export financing.”

Ex. 1.

11. AFP identified the time period for its request as “January 1, 2015 to the present,” and defined the term “present” as “the date on which the agency begins its search for responsive records.” *Id.* at 2 & 2 n.4.

12. AFP defined the term “record” as “the entirety of the record any portion of which contains responsive information.” *Id.* at 1 n.3 & 2 n.4.

13. AFP requested a public interest fee waiver and classification as a representative of the news media for fee purposes. *Id.* at 2–3.

14. By email, dated July 25, 2019, Ex-Im acknowledged that it had received AFP’s FOIA request on July 24, 2019 and assigned it tracking number 201900059F. Ex. 2.

15. Citing “unusual circumstances” and the need to conduct a search “in another [o]ffice,” Ex-Im extended its response deadline by ten working days. *Id.*

16. Ex-Im deferred its consideration of AFP’s fee-related requests. *Id.*

17. By email, dated July 29, 2019, Ex-Im contacted AFP to explain that its request would “take a significant amount of time . . . to process[.]” Ex. 3. Thus, “[t]o affect a more rapid response,” Ex-Im requested that AFP “narrow the scope of [its] request.” *Id.*

18. AFP responded to Ex-Im on the same day. *See id.* AFP indicated that it would be “difficult [for it] to specify what [Ex-Im] office may be involved” in complying with 12 U.S.C. § 635(b)(1)(A), but “EXIM officials would have a better idea of which offices handle this.” *Id.* AFP nevertheless provided a preliminary list of offices and employees for Ex-Im to search.

19. To date, Ex-Im has failed to provide any further update on the processing of AFP’s request, and it has not issued a final determination or produced any records.

B. Department of the Treasury (FOIA Request No. 2019-07-188)

20. By letter, dated July 24, 2019, AFP submitted a FOIA request to Treasury seeking access to three categories of records:

1. All internal communications regarding Treasury’s actions to assist EXIM “reduce government subsidized export financing.”
2. All external communications, including but not limited to the following entities, regarding Treasury’s actions to assist EXIM “reduce government subsidized export financing.”
 - a. The White House
 - b. Department of the Treasury
 - c. Export financing instrumentalities of other governments

- d. International organizations
 - e. Other individuals or organizations relevant for complying with the charter.
3. All records (memoranda, policy documents) regarding Treasury's actions to assist EXIM to "reduce government subsidized export financing."

Ex. 4.

21. AFP identified the time period for its request as "January 1, 2015 to the present," and defined the term "present" as "the date on which the agency begins its search for responsive records." *Id.* at 2 & 2 n.4.

22. AFP defined the term "record" as "the entirety of the record any portion of which contains responsive information." *Id.* at 1 n.3 & 2 n.4.

23. AFP requested a public interest fee waiver and classification as a representative of the news media for fee purposes. *Id.* at 2–3.

24. By letter, dated August 2, 2019, Treasury acknowledged that it had received AFP's FOIA request and assigned it tracking number 2019-07-188. Ex. 5.

25. Citing "unusual circumstances"—namely, the need to conduct searches in multiple offices, process voluminous records, and undertake consultation with different program offices—Treasury extended its response deadline by ten working days. *Id.*

26. Treasury deferred its consideration of AFP's fee-related requests. *Id.*

27. To date, Treasury has failed to provide any further update on the processing of AFP's request, and it has not issued a final determination or produced any responsive records.

COUNT I

Violation of the FOIA: Failure to Comply with Statutory Requirements

28. AFP repeats all of the above paragraphs.

29. The FOIA requires an agency to accept and process any request for access to agency records that (a) “reasonably describes such records,” and (b) “is made in accordance with published rules stating the time, place, fees, . . . and procedures to be followed[.]” 5 U.S.C. § 552(a)(3)(A).

30. The FOIA also requires an agency to respond to valid requests within twenty (20) business days or, in “unusual circumstances,” within thirty (30) business days. *Id.* § 552(a)(6)(A)–(B). If an agency requires additional time to process a request, the FOIA mandates that the agency provide the requester “an opportunity to arrange with the agency an alternative time frame for processing the request[.]” *Id.* § 552(a)(6)(B)(ii).

31. All of the FOIA requests at issue in this case seek access to agency records maintained by Defendants, reasonably describe the records sought, and otherwise comply with the FOIA and Defendants’ applicable regulations.

32. Defendants have failed to issue their final determinations on or to complete production of all records responsive to the FOIA requests at issue within the applicable time limits.

33. AFP has exhausted its administrative remedies under 5 U.S.C. § 552(a)(6)(C).

RELIEF REQUESTED

WHEREFORE, Plaintiff AFP respectfully requests and prays that this Court:

- a. Order Defendants to process AFP’s FOIA requests and issue final determinations within twenty (20) business days of the date of the Order;
- b. Order Defendants to produce all responsive records promptly upon issuing their final determinations;
- c. Maintain jurisdiction over this case until Defendants comply with the Order and, if applicable, adequately justify their treatment of all responsive records;

- d. Award AFP its costs and reasonable attorney fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
- e. Grant such other relief as the Court may deem just and proper.

Dated: October 1, 2019

Respectfully submitted,

/s/ Ryan P. Mulvey

Ryan P. Mulvey

D.C. Bar No. 1024362

R. James Valvo, III

D.C. Bar No. 1017390

CAUSE OF ACTION INSTITUTE

1875 Eye Street, N.W., Suite 800

Washington, D.C. 20006

Telephone: (202) 499-4232

Facsimile: (202) 330-5842

ryan.mulvey@causeofaction.org

james.valvo@causeofaction.org

Counsel for Plaintiff Americans for Prosperity